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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EDITH ROSARIO, Defendant and Appellant.	H042286 (Santa Cruz County Super. Ct. No. F27253)

Following a jury trial, defendant Edith Rosario was found guilty of stalking (Pen. Code, § 646.9, subd. (a))[1] (count 1) and criminal trespass (§ 602, subd. (*o*)) (count 2). The court suspended imposition of sentence and placed defendant on formal probation on certain terms and conditions.

On appeal, defendant raises various challenges to the stalking conviction, including alleged insufficiency of the evidence, instructional error, erroneous admission of privileged statements, and ineffective assistance of counsel. She also asserts that a no-contact probation condition must be modified to include an express knowledge requirement.

We agree that the challenged probation condition must be modified under *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K.*). We otherwise discern no error. Accordingly, we modify that probation condition and affirm the order granting probation as modified.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

I

Evidence

Reverend Deborah Lynn Johnson founded Inner Light Ministries (Inner Light) in 1997 and was its senior minister. Inner Light was an independent, nondenominational, "omnifaith" organization. Reverend Johnson met defendant, who was 55 years old at the time of trial in 2014, approximately 10 years before trial. Defendant had been homeless and unemployed, and she had come to Inner Light and asked for help with housing.

Reverend Johnson was ordinarily at Inner Light's property, which consisted of 3.3 acres on Soquel Drive in Soquel, every day of the week for an average of 12 hours a day. Reverend Johnson was "quite frequently" in and out of the teen room, which was a multipurpose room that was used for various purposes, such as classes, training, meetings, and storage.

The teen room was in the administration and education building, which also housed all the administrative offices, including Reverend Johnson's office. The teen room had an exterior door that served as the main access to the grounds. The children's playground was outside the teen room. There was a gate between the playground and the parking lot. Reverend Johnson's office was close to a hallway leading to the front reception area, where there was a door to the outside and the parking lot.

In 2013, defendant began to give gifts to Reverend Johnson. The initial gift bags contained art and crafts, and the reverend knew they were from defendant because defendant told her so.

In September 2013, defendant began taking a Core I class being taught by Julie Krokidas-Wooden (Wooden), a teacher at Inner Light. Wooden learned that defendant was talking about her suicidal thoughts to other students. It became clear to Wooden that defendant was struggling with depression and suicidal tendencies. Wooden spoke with defendant about her suicidal thoughts outside of class. Wooden had met

defendant approximately nine or 10 years before the 2014 trial, when Wooden was merely a congregant.

Beginning in late 2013, defendant made it plain that she wanted to spend more time with Reverend Johnson. Over time, defendant increasingly vied for Reverend Johnson's attention; defendant wanted to be hugged by the reverend and to have special time with her.

In late 2013 and early 2014, the nature of the gifts that defendant was giving to Reverend Johnson changed. The gift bags contained items such as defendant's dirty clothing, locks of defendant's hair, a black cloth doll that looked like a voodoo doll, appendages of white plastic dolls, garbage, and half-opened candy. Defendant had dolls without arms or legs hanging from her backpack. The reverend told defendant that she preferred not to be given gift bags.

By early 2014, the amount of time defendant was spending at Inner Light escalated. She arrived in the morning with her belongings. She appeared frequently at Inner Light at various times throughout the day. Her behavior was somewhat erratic. Defendant transported her belongings in a backpack, a rolling cart or luggage, and bags, and she generally set her things down in the teen room. Defendant was "primarily hanging out in the teen room or on the playground," and if there was a meeting in the teen room, defendant was asked to move to another location. She made herself meals in Inner Light's kitchen; she kept bags of food at Inner Light. Sometimes her food rotted, which made the teen room smell bad. Sometimes defendant slept at Inner Light.

The staff was increasingly frustrated with defendant's behaviors. Reverend Beth Love, a minister at Inner Light who worked with Reverend Johnson, had known defendant for approximately 10 years before trial. Reverend Love had first seen signs of defendant's mental illness then. She believed defendant needed mental health support.

In late February 2014, Reverend Love held a basic family ministries training at Inner Light for people considering volunteering or becoming staff. There was only one

attendee so Reverend Love welcomed defendant, who was in the room where the training was going to be conducted, to join them. During this training, defendant disclosed a significant family trauma in her past. The reverend made an appointment with defendant for a one-hour private, spiritual counseling session on March 4, 2014.

On March 4, 2014, defendant arrived about 45 minutes late to the session scheduled with Reverend Love. Reverend Love met with defendant in the prayer room in Inner Light's administration and education building for about 15 minutes. Defendant, who was afraid and very upset, told Reverend Love that her ex-partner Terry had made her say, "I hate Reverend Deborah and I'm going to kill her." Reverend Love, who at that time did not think defendant would actually carry out such an action, "reinforced that she needed some mental health support at that point." Reverend Love said a prayer with defendant to the effect that "Edith isn't going to kill Reverend Deborah, Edith doesn't hate Reverend Deborah, [and] Edith loves Reverend Deborah." Defendant "started crying big, big, big sobs."

At their March 4, 2014 meeting, Reverend Love was more concerned for defendant's mental health than for the possibility that defendant would kill somebody, because defendant had expressed a desire to kill herself multiple times over the years but had not acted on it. The reverend made an appointment with defendant for the next day, but defendant did not show up for that appointment.

On March 6, 2014, another gift bag from defendant was left for Reverend Johnson; it was found hanging on the reverend's office door. The bag contained a scarf that defendant had been crocheting earlier that day, a pair of earbuds, and chunk of human hair that looked like defendant's hair. Reverend Johnson indicated that she did not want the gifts.

Reverend Love returned the gift bag to defendant, whom she found cooking a meal in Inner Light's kitchen, and told defendant not to give any further gifts to Reverend Johnson. Since the staff was about to lock up the facilities, Reverend Love

asked defendant to gather her things and leave. The reverend had to ask defendant to leave again before she finally left.

After praying, Reverend Love decided she had missed an opportunity to speak to defendant, and she went to find defendant. Reverend Love drove to the bus stop, where she found defendant, and she asked defendant to get in her car. Reverend Love told defendant that it appeared as though defendant was stalking Reverend Johnson and that defendant "needed to stop those behaviors immediately" or law enforcement would be called. Reverend Love asked whether defendant wanted law enforcement to be called or whether she wanted help. Defendant said that "probably she wanted help," and the reverend inquired about her mental health support and asked defendant to agree to go to county mental health the next day to ask for services. The reverend drove defendant to the Hitching Post, a motel in Santa Cruz County. Defendant told Reverend Love that voices or compulsions were telling her to go to the motel.

Defendant did not go to county mental health. Rather, she continued to frequent Inner Light as she had been doing for months. She continued "hanging out" in the teen room or on the playground and "crashing" Inner Light activities that were not for her. Inner Light's staff had ongoing discussions about establishing boundaries regarding defendant's presence at Inner Light.

Reverend Love and other staff members finally agreed that defendant needed to be told that she was welcome to attend Inner Light services and any class or activity for which she was eligible but that she could not "hang out" there. On about March 19, 2014, Reverend Love spoke with defendant, explaining the limitations regarding her presence at Inner Light and encouraging her to find a mental health place where she could "hang out."

Defendant was told that she could no longer use Inner Light's address as her own mailing address and that her mail would not be given to her. She was told that she could not leave any personal articles on the premises, she could not use the kitchen to cook, she

could not leave gifts on Reverend Johnson's office door, and she could be on the premises only a certain length of time before an event.

At some point, Reverend Eileen Attanasio found "two folding style knives and one saw blade style knife," which were brand new and still in their packaging, in Inner Light's teen room. They eventually were turned over to Reverend Love, but at the time, Reverend Love thought they were related to the teen advisor's craft activities. The knives were ultimately retrieved by Deputy Dakota Clark of the Santa Cruz County Sheriff's Office.

On March 21, 2014, defendant entered a Wal-Mart in Salinas, and a loss prevention officer observed defendant conceal a number of items, including a knife, in a cart and leave the store without making any attempt to pay for them. Defendant told the loss prevention officer that she was suicidal. In her statement to law enforcement, defendant admitted that she had stolen the items from Wal-Mart. When an officer asked defendant why she took the items, she stated, "The demons in me might have made me do it." Defendant indicated that she had mental health issues.

On March 25, 2014, after not seeing defendant for at least four days, Reverend Love saw defendant with her cart in the general vicinity of the sanctuary. She was wearing dirty clothing and looked bedraggled. Reverend Love asked defendant to accompany her to the prayer room to pray and talk.

During their March 25, 2014 conversation in the prayer room, defendant said that she had spent four days in the Monterey County jail, after taking things, including a knife, from a Wal-Mart. Defendant told Reverend Love that she had felt compelled to get on a bus, that she had been "told or compelled to put some things in her cart and to walk out the door" of the store, and that she "couldn't stop herself." Defendant agreed with the reverend that her mental health issues were escalating. Reverend Love asked defendant, if she had compulsions or urges to kill Reverend Johnson, how she would do

that. Defendant said with a knife. Reverend Love suggested to defendant that they call 911 and ask for defendant to be taken to a mental health facility.

On March 25, 2014, with defendant's consent, Reverend Love called 911 and spoke to a dispatcher on the telephone in defendant's presence. Deputy Fred Murphy of the Santa Cruz County Sheriff's Office was dispatched to Inner Light, and the reverend spoke with him in defendant's presence. Reverend Love believed that defendant needed to be in a locked mental facility until she was stabilized.

Defendant told Deputy Murphy that she had been in jail in Monterey County, and she had not taken her antidepressants. She said that she was hearing voices in her head telling her to hurt herself or to kill the church's senior minister. She said that she did not want to act on the voices and she was able to control the voices, but she was scared because she was not sure that she would be able to continue controlling the voices. Reverend Love told Deputy Murphy that defendant would be welcome back if defendant obtained some mental health help.

Deputy Murphy decided to place defendant on a Welfare and Institutions Code section 5150 hold because the voices were telling her to harm herself or another person. Defendant was taken to the Behavioral Health Center on Soquel Avenue.

Reverend Love told Reverend Johnson and Inner Light's director of prayer ministry about defendant's compulsions to kill Reverend Johnson with a knife. Defendant had recently asked Reverend Johnson whether she could live with the reverend and be the reverend's companion, and Reverend Johnson shared that information with Reverend Love. Reverend Johnson was "really, really scared."

Defendant was released on March 26, 2014, and she returned to Inner Light.

On April 5, 2014, Inner Light was holding an off-site family ministries retreat at the home of one of its teachers in Aptos. Sometime between 7:00 a.m. and 7:30 a.m., Reverend Love saw defendant leave the playground and go into the parking lot through

Inner Light's playground gate. Later, defendant, who had obtained a ride with Reverend Love's husband, arrived at the offsite retreat.

By the time of the offsite retreat on April 5, 2014, Reverend Johnson was scared of defendant. Reverend Johnson decided to keep a distance from defendant. During the retreat, defendant tried to get physically close to Reverend Johnson. While they were both in the kitchen, defendant gave the reverend a card, which said that defendant really wanted to spend time alone with the reverend.

As part of the retreat activities, participants made scarves and other crafts, and at the end of the retreat they were given an opportunity to give a gift to another participant. Defendant gave something she had made to Reverend Johnson, who was sitting on the living room couch. After the retreat was over, defendant took off a red knit shawl, handed it to Reverend Johnson, and said that she wanted the reverend to have it. The reverend left the retreat before defendant, and on her way home, the reverend threw away defendant's gifts.

The teacher in whose home Inner Light's offsite retreat was held found two knives and a small saw, still in their original packaging, in her living room couch. On Sunday April 6, 2014, she informed Reverend Love about the knives and turned them over to Inner Light. Reverend Love was "highly alarmed," and she ran to the social hall where a gathering of people were praying with Reverend Johnson, all with their eyes closed. Reverend Love was "so frightened"; she made certain that defendant was not in the social hall or on the grounds. Reverend Love telephoned defendant, told her that the knives had been found, and directed her not to come to Inner Light's service that day. The reverend made an appointment for defendant to come to Inner Light at 4:00 p.m., a time when Reverend Johnson would be off the property. Reverend Love intended to take defendant to get mental health services. The knives were ultimately collected by Deputy Shay Baldwin of the Santa Cruz Sheriff's Office.

When, on April 6, 2014, Reverend Johnson learned about the knives and the saw found in the couch where she had been sitting during the offsite retreat, she felt really scared. At trial, Reverend Johnson described the knives as switchblades, and she stated that they had "really scared" her because they could be used to kill. The saw also frightened her because "the only thing you can do with a saw is dismember things," and she remembered the doll parts in the gift bag from defendant.

At approximately 1:00 p.m. on April 6, 2014, Reverend Love was alerted by someone that defendant was in Inner Light's social hall. Reverend Love saw defendant walking into the teen room from the social hall. In the teen room, the reverend confronted defendant about the knives found at the retreat. Defendant admitted to Reverend Love that she had left those knives. Reverend Love also asked whether defendant had previously left knives in the teen room, and defendant said yes. Reverend Love asked defendant to leave the facilities and return at 4:00 p.m. for their appointment.

Defendant did not return for her 4:00 p.m. appointment on April 6, 2014. Reverend Love telephoned defendant, and she told defendant that she could not return to Inner Light until issues were resolved. Reverend Love said that she was willing to help defendant obtain mental health support. At this point, Reverend Love was terrified for Reverend Johnson.

In a telephone conversation on April 7, 2014, Reverend Love made an appointment to meet defendant at 11:00 a.m. on April 9, 2014 at the Hitching Post motel.

When Reverend Love arrived for the scheduled April 9, 2014 meeting, she was told that defendant had left about an hour earlier. Reverend Love called Inner Light and warned that defendant might be already there or on her way there. After making some calls, the reverend learned that defendant had gone to Inner Light and then to the Crisis Stabilization Program. Reverend Love had told defendant that she would meet defendant at the program.

Reverend Love then received a telephone call from Laura Cash-Helgren, with whom Reverend Love shared an office at Inner Light. She informed Reverend Love that two more knives and a saw had been found, this time outside the teen room's exterior door to the playground. They were turned over to Reverend Love, and they were ultimately collected by Deputy Baldwin. Defendant had also left a bag containing thank-you cards, none of which were addressed to Reverend Johnson, a beaded shell necklace, and a bouquet of flowers.

At the Crisis Stabilization Program on April 9, 2014, Reverend Love asked defendant whether she had left the knives, and defendant admitted that she had. The reverend and defendant met with a counselor. Defendant stayed at the program's shelter for one night.

Security was increased at Inner Light's facilities. Locks were put on the gates. It was decided that Reverend Johnson could not be on the premises or leave the building by herself at night. Staff escorted Reverend Johnson whenever she went to her car or left her office, even to the bathroom.

In April 2014, Wooden was talking to defendant two to three times a week. Wooden made a number of telephone calls to different organizations that supported individuals struggling with mental illness. Defendant admitted to Wooden that she was leaving knives at Inner Light, she confirmed that she was hearing voices telling her to kill Reverend Johnson, and she agreed that she needed to get help.

Defendant had been instructed to call 911 if she felt suicidal, and she had agreed to call 911 if she felt out of control. Sometime in April 2014, defendant called 911. Defendant was hospitalized.

After defendant's release from a hospital, Wooden tried to help defendant obtain further support, and Wooden arranged for her to go to Telos, a residential mental health treatment center. Defendant stayed at Telos for only one day, but left. Wooden helped

defendant return to Telos, but she left again. Wooden tried to assist defendant with obtaining medication. Defendant did not agree that she needed to be on medication.

On the morning of Wednesday April 23, 2014, Reverend Love received a telephone call from defendant, who said she was shopping in Scotts Valley. Defendant said that she had spent the night at Telos, but she had left to avoid taking medication.

At approximately 12:50 p.m. on April 23, 2014, two knives and a saw, still in their packaging, were discovered outside the teen room's exterior door to the playground. Reverend Love telephoned defendant, who indicated that she had come to participate in choir practice on the night of Tuesday April 22, 2014 "even though she knew that she shouldn't" and that she had left the knives and the saw at that time.

On April 23, 2014, Deputy Baldwin was dispatched on a possible "5150" to a mental health facility on Prather Lane, where he made contact with defendant at roughly 2:00 p.m. Based on his conversation with defendant, the deputy determined that defendant did not meet the criteria for a 5150 hold, which requires that the person be a danger to himself or herself or gravely disabled due to a mental health condition. As a courtesy, Deputy Baldwin gave defendant a ride to the Crisis Stabilization Program on Soquel Avenue, where defendant was free to voluntarily walk in.

Later on April 23, 2014, Deputy Baldwin received a telephone call from Reverend Love, who provided a brief timeline of events concerning defendant. The deputy began writing a stalking report.

At approximately 9:30 p.m. on April 23, 2014, another set of knives was found outside the teen room's exterior door.

On the morning of Thursday April 24, 2014, Reverend Love went to the Inner Light to make sure that defendant had not come to a food distribution program being held there. The Reverend also wanted to provide instructions to call 911 if defendant did show up.

On April 24, 2014, Deputy Baldwin spoke with Reverend Johnson on the telephone for approximately 20 minutes.

On the afternoon of Thursday April 24, 2014, just after Reverend Love had driven away from Inner Light, she saw defendant on Monterey Avenue. She stopped the car and asked defendant to get in. Reverend Love asked defendant to hand over the knives. Defendant opened her purse and took out three knives, still in their packaging, and handed them to the reverend. Reverend Love told defendant that they were going to the Crisis Stabilization Program so she could get into a facility and everyone would be safe. Reverend Love drove defendant to the program.

Later on April 24, 2014, Reverend Love learned that two more knives and a saw had again been found outside the teen room's door. The reverend called 911, and Deputy Baldwin responded.

On the evening of April 24, 2014, Deputy Baldwin spoke with Reverends Johnson and Love at Inner Light's facilities, and he collected a total of 18 knives and saws. Reverend Johnson was displaying "some heightened emotion and fear" concerning the situation. Deputy Baldwin later learned that Deputy Clark had recovered additional knives from Inner Light.

Afterward, the deputy and his partner went to the Hitching Post. They spoke with defendant in her motel room. Defendant's statements were recorded, and most of the audio recording was played for the jury.

During her conversation with the deputies, defendant acknowledged that she had a compulsion to get knives and take them to Inner Light, and defendant indicated that she had shared her fear that she could hurt Reverend Johnson, the senior minister, with someone from Inner Light. Voices were telling her to rush Reverend Johnson on the pulpit. She was afraid she might act on her compulsions. Defendant estimated that she had taken 15 to 18 knives to the church. She also admitted leaving some of her hair for Reverend Johnson because of a compulsion.

Defendant indicated that, as a result of her compulsions, she had shoplifted the knives from Home Depot or Wal-Mart. Defendant also indicated that she had left knives outside the exterior entrance to the teen room.

Defendant further indicated that, even though she had been instructed not to go to Inner Light, she still felt compelled to go there. She had tried to go there twice that very day. The first time, Reverend Love had interceded, and defendant admitted to the deputies that she did have knives in her possession at that time. The second time, defendant had gone to the church at approximately 6:00 p.m. and left knives there.

During the interview, defendant expressed concern that she might stab Reverend Johnson. When defendant experienced a compulsion, she went to get knives and then headed to the church. When she got to the church, the compulsion subsided and she left the knives there. Defendant indicated that she knew what she was doing was wrong and she knew that she was scaring the reverend, but she still did it anyway. Defendant agreed that, even though she felt compelled to do something, she knew it was not right and she could stop if she wanted to.

Defendant acknowledged that at one time she thought that the reverend and she might have a personal relationship, more than mere friendship. Defendant admitted that she had given Reverend Johnson a card expressing her desire to spend more time with the reverend. Defendant acknowledged that, if she were the reverend, she would be fearful and she would say that she was being stalked. She knew that what she was doing was wrong, and she had some understanding that her actions amounted to stalking.

Defendant was arrested.

II

Discussion

A. *Stalking Conviction*

1. *Crime of Stalking*

"Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety . . . is guilty of the crime of stalking." (§ 646.9, subd. (a).) The word "harasses" means "engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose." (§ 646.9, subd. (e).) The phrase "course of conduct" means "two or more acts occurring over a period of time, however short, evidencing a continuity of purpose." (§ 646.9, subd. (f).)

Under section 646.9, a "credible threat" includes "a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety . . . , and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety . . . ." (§ 646.9, subd. (g).) "It is not necessary to prove that the defendant had the intent to actually carry out the threat." (*Ibid.*)

2. *Waiver of Penitent's Privilege*

a. *Background*

Defendant moved in limine to exclude any communication made by her to Reverend Love regarding "hurting, killing or harming Reverend Deborah Johnson during any spiritual counseling sessions" as privileged penitential communications under Evidence Code section 1033. Evidence Code section 1033 provides "the penitent with a

privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication." (Cal. Law Revision Com. com., 29B pt. 3B West's Ann. Evid. Code (2009 ed.) foll. § 1033, p. 58.)

In written opposition to defendant's motion, the People asserted that defendant had waived the privilege by failing to object to the introduction of such evidence at two prior preliminary hearings and by signing a "Consent to Release Confidential Information" form (consent form), which allowed Reverend Love to release information. The consent form, which was signed by defendant and dated March 28, 2014, gave defendant's consent and authorization to Reverend Love "to release any information pertaining to" her to various specified agencies and persons, including law enforcement and Reverend Johnson.

At the hearing on the motion, the trial court found that defendant's consent and authorization encompassed all the information that Reverend Love had at the time.

On appeal, defendant argues that the state failed to rebut the presumption of confidentiality and to demonstrate that she waived the clergy-penitent privilege under Evidence Code section 912. She acknowledges that the consent form appears "all encompassing."

b. *No Error in Finding Privilege Waived*

The penitent privilege is subject to Evidence Code section 912. (Evid. Code, § 1033.) Subdivision (a) of Evidence Code section 912 provides in pertinent part: "Except as otherwise provided in this section, the right of any person to claim a privilege provided by [Evidence Code section] . . . 1033 (privilege of penitent) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including

failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege."

Defendant now contends that (1) she lacked capacity to waive her privilege and (2) the waiver was for the limited purpose of "medical diagnosis and treatment" of her mental illness and compulsions.[2] Even assuming that those contentions were not forfeited and were preserved for review, we reject them.

Once the People had presented evidence that defendant had given her consent and authorization to Reverend Love to disclose any information pertaining to her, defendant had the burden of producing evidence to support her contentions regarding the consent form's lack of enforceability due to her incompetency to execute it or its limited scope. (See Evid. Code, § 550.) In reviewing the correctness of a trial court's ruling, we examine the evidence before the court at the time it ruled. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405; *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) The consent form itself supported the trial court's finding that defendant had waived the penitent's privilege. Defendant has not shown that the trial court erred in making that finding, based upon the evidence before it.

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[2] These specific contentions were not raised below. "[A]s a general rule, 'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights. [Citations.]" (*In re Seaton* (2004) 34 Cal.4th 193, 198.) The purpose of the forfeiture rule is to "encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "In requiring an objection at trial, the forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error. [Citation.]" (*People v. Kennedy* (2005) 36 Cal.4th 595, 612, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

c. Ineffective Assistance of Counsel Claim

Defendant argues that defense counsel's failure to investigate the context of her statements to Reverend Love and the consent form to present evidence as to the limited medical purpose of the consent form and the statements of admission at both preliminary hearings, and to request an Evidence Code section 402 hearing regarding those matters constitutes ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish that his counsel's performance was deficient and resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) As to deficient performance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" measured against "prevailing professional norms." (*Id*. at p. 688.) "Judicial scrutiny of counsel's performance must be highly deferential," a court must evaluate that performance "from counsel's perspective at the time" without the "the distorting effects of hindsight," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (*Id*. at p. 689.)

The prejudice prong requires a defendant to establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, 466 U.S. at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid*.) "In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. [Citations.] Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different. [Citation.] This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'

[Citation.] The likelihood of a different result must be substantial, not just conceivable. [Citation.]" (*Harrington v. Richter* (2011) 562 U.S. 86, 111-112.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697.)

As to prejudice, defendant merely asserts that "[t]he error was prejudicial because without the privileged statements, there was insufficient evidence that [defendant] intended to instill fear in Reverend Deborah." Defendant fails to show that her current challenges to the consent form are meritorious.

Defendant's motivation for giving her consent to release confidential information must be distinguished from the scope of that consent. "[E]xtrinsic evidence as to the circumstances under which a written instrument was made has been held to be admissible in ascertaining the parties' expressed intentions, subject to the limitation that extrinsic evidence is not admissible in order to give the terms of a written instrument a meaning of which they are not reasonably susceptible. [Citations.]" (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 522.) Extrinsic evidence must be relevant to prove a meaning of which the language of the written consent was reasonably susceptible. (See *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37.) The written consent stated that "I, Edith Rosario, . . . do hereby consent and authorize Rev. Beth Love . . . to release any information pertaining to me to the agencies/persons indicated below," which included "law enforcement," specifically the offices of the Monterey County Sheriff and the Santa Cruz County Sheriff, and included Reverend Johnson. Defendant has not pointed to any language reasonably susceptible of the interpretation that defendant's consent to release confidential information was

restricted to disclosures for the purpose of seeking medical diagnosis and treatment for her.

Although defendant now cites evidence from trial that indicates she was suffering from mental illness when she executed the consent form, the evidence does not demonstrate that she was incompetent to waive any penitent's privilege. Subdivision (b) of Civil Code section 39, which defendant cites, does not establish such incompetency. The code section merely concerns contractual capacity and creates a presumption that may be rebutted: "A rebuttable presumption affecting the burden of proof that a person is of unsound mind shall exist *for purposes of this section* if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence." (Civil Code, § 39, subd. (b), italics added.) Even assuming that defendant could have established the factual predicate and the presumption was not rebutted, the presumption applies only to that section, which allows for rescission of "[a] conveyance or other contract of a person of unsound mind." (Civ. Code, § 39, subd. (a).) In general, there is "a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions." (Prob. Code, § 810, subd. (a).)

Furthermore, the California Supreme Court has observed "that many persons who suffer from mental illness or related disorders can understand the nature of legal proceedings and determine their own best interests." (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1128.) " '[M]ental illness "often strikes only limited areas of functioning, leaving other areas unimpaired, and consequently . . . many mentally ill persons retain the capacity to function in a competent manner." ' [Citation.]" (*In re Qawi* (2004) 32 Cal.4th 1, 17; see Welf. & Inst. Code, § 5331, subd. (a) ["No person may be presumed to be incompetent because he or she has been evaluated or treated for mental disorder or chronic alcoholism, regardless of whether such evaluation or treatment was voluntarily or involuntarily received."].)

We reject defendant's ineffective assistance claim because she has not established that there is a reasonable probability that, but for the alleged failures of defense counsel, "the result of the proceeding would have been different." (*Strickland, supra,* 466 U.S. at p. 694.)

3. No Instructional Error

Defendant asserts that, where a threat is made to a third party concerning the alleged stalking victim, an element of the crime of stalking is the perpetrator's specific intent that his or her threat be "relayed to the object of the threat." Defendant contends that the trial court's instruction failed to inform the jury that, to prove her guilty of stalking, the People were required to prove that she "intended . . . Reverend Beth to communicate her threats to Reverend Deborah."

The trial court instructed pursuant to the standard stalking instruction, CALCRIM No. 1301. As relevant to defendant's claim, the court told the jury in part: "The defendant is charged in Count 1 with stalking in violation of Penal Code Section 646.9. To prove that the defendant is guilty of this crime the People must prove that, one, the defendant willfully and maliciously harassed or willfully and maliciously repeatedly followed another person, and, two, that the defendant made a credible threat with the intent to place the other person in reasonable fear for her safety. [¶] A credible threat is one that causes the target of the threat to reasonably fear for his or her safety and one that the maker of the threat appears to be able to carry out. [¶] A credible threat may be made orally, in writing or electronically or may be implied by a pattern of conduct or a combination of statements and conduct." It also instructed that "[t]he People have the burden of proving beyond a reasonable doubt that the defendant acted with the required intent, specifically: Intent to place the other person in reasonable fear for her life. If the People have not met this burden, you, the jurors, must find the defendant not guilty of stalking."

In *People v. McPheeters* (2013) 218 Cal.App.4th 124 (*McPheeters*), the appellant raised the same contention as defendant does now. The appellant contended that section 646.9 included "an additional element not expressly stated in the statute—that of specifically intending that comments to third parties be conveyed to the victim." (*McPheeters, supra,* at p. 136.) The appellate court indicated that such specific intent was not an element of the offense and a credible threat against a person may be implied from a defendant's entire course of conduct, including threatening statements made to a third party that foreseeably will be conveyed to the target of the threat. (*Id*. at pp. 137-138.) In this case, the jury could reasonably infer that defendant anticipated that her statements to Reverend Love concerning a possible compulsion to kill or harm Reverend Johnson, Inner Light's senior minister, with a knife would be conveyed to Reverend Johnson in order to ensure the safety of Reverend Johnson and the Inner Light community.

In any case, under the stalking statute, a "credible threat" may be "a verbal or written threat" or "a threat implied by a pattern of conduct" or some combination provided the threat is made with the requisite intent. (§ 646.9, subd. (g).) In arguing that there was a credible threat against Reverend Johnson, the prosecution focused on the threat implied by defendant's repeated and escalating acts of leaving knives, at the offsite retreat and at Inner Light. The jury had to decide whether that pattern of conduct was done with the intent to place Reverend Johnson in reasonable fear for her safety based on all the circumstances. Those circumstances included defendant's statements to others, including Reverend Love, which constituted circumstantial evidence from which the jurors could infer defendant's state of mind that accompanied her actions.

In this case, the prosecution was not arguing that the "credible threat" involved a verbal threat made by defendant against Reverend Johnson, expressing her intent to harm Reverend Johnson. There was no evidence of any such express statement of intent, either made directly to Reverend Johnson or indirectly to Reverend Love. Therefore, under the

circumstances of this case, the court was not required to instruct that, to prove that defendant was guilty of stalking, it was necessary for the prosecution to prove that defendant intended that a verbal threat made to a third person be communicated by the third person to the target of the threat. It was enough that the instructions required the People to prove, with respect to intent, that "the defendant made a credible threat with the intent to place the other person in reasonable fear for her safety."

4. *Sufficient Circumstantial Evidence of Requisite Intent*

As stated, a person who "willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety" commits the crime of stalking. (§ 646.9.) Defendant challenges the sufficiency of the evidence to prove that she made a credible threat with the intent to place Reverend Johnson in reasonable fear for her safety. She does not dispute that the evidence was sufficient to establish the following or harassing element of the offense.

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) Our review must presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) Even where . . . the evidence of guilt is largely circumstantial, our task is not to resolve credibility issues or evidentiary conflicts, nor is it to inquire whether the evidence might reasonably be reconciled with the defendant's innocence. (*Id.* at p. 92; *People v. Maury* (2003) 30 Cal.4th 342, 403.) It is the duty of the jury to acquit the defendant if it finds the circumstantial evidence is susceptible to two interpretations, one of which suggests guilt and the other innocence. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) But the relevant inquiry on appeal is whether,

in light of all the evidence, '*any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.' (*People v. Towler* (1982) 31 Cal.3d 105, 118.)" (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.)

"Mental state and intent are rarely susceptible of direct proof and must therefore be proven circumstantially. (*People v. Smith* (2005) 37 Cal.4th 733, 741; *People v. Beeman* (1984) 35 Cal.3d 547, 558-559.) Consequently, a defendant's actions leading up to the crime may be relevant to prove his or her mental state and intentions at the time of the crime. (See *People v. Avila* (2009) 46 Cal.4th 680, 701; *Smith*, at p. 741.)" (*People v. Thomas* (2011) 52 Cal.4th 336, 355.) A defendant's specific intent may be inferred from the facts and circumstances shown by the evidence. (See *People v. Holt* (1997) 15 Cal.4th 619, 669-670.)

Defendant asserts that the only potential threats that she made were her disclosures of compulsions to kill or harm Reverend Johnson, and the context of those statements indicated that she did not intend those disclosures to be conveyed to Reverend Johnson. She asserts that she could not have intended her statements to Reverend Love to be relayed to Reverend Johnson because the communications were privileged and she was seeking help for her mental illness and compulsions, and she could not have reasonably foreseen that those statements would be relayed to Reverend Johnson.

Defendant further contends that the circumstantial evidence does not rationally contradict her testimony that she told Reverend Love about her compulsions to harm Reverend Johnson to make sure that she did not act on them. As to the knives, defendant maintains that she did not intend the knives to threaten Reverend Johnson, pointing out that they were not left in front of the reverend's office or addressed to her. Defendant directs us to her testimony that she left the knives to prevent herself from hurting herself and she did not leave them as a threat.

Those arguments are not persuasive. In deciding whether defendant intended to "place the person that is the target of the threat in reasonable fear for his or her safety"

(§ 646.9, subd. (g)), the jury was free to make reasonable inferences based on circumstantial evidence even if those inferences contradicted defendant's testimony. "[A] defendant's state of mind is most often shown through circumstantial evidence which often prevails over the direct testimony of the defendant to the contrary." (*People v. Anderson* (1983) 144 Cal.App.3d 55, 62.) Further, as stated, intent to actually carry out a credible threat is not an element of stalking. (§ 646.9, subd. (g).)

" '[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.' (*People v. Farnam* [(2002)] 28 Cal.4th [107,] 143.) We do not reweigh evidence or reevaluate a witness's credibility. (*People v. Ochoa* [(1993)] 6 Cal.4th [1199,] 1206.)" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

As stated, a "credible threat" under section 646.9 includes "a threat implied by a pattern of conduct or a combination of . . . communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety." (§ 646.9, subd. (g).) Here, the evidence was sufficient to show such credible threat.

Defendant's pattern of conduct included her act of leaving knives and a saw on the couch where Reverend Johnson had been sitting during an offsite retreat and her repeated acts of leaving (or attempting to leave) knives and saws in the vicinity of Inner Light's teen room, a location frequented by Reverend Johnson, even after defendant was banned from Inner Light's premises. The jury could reasonably infer from the evidence, especially in light of defendant's previous strange "gifts" to Reverend Johnson (including disassembled doll appendages and defendant's own hair) and defendant's unrequited

overtures to Reverend Johnson for a closer personal relationship, that defendant had made a credible threat against Reverend Johnson with the subjective intent to place Reverend Johnson in reasonable fear for her safety.

The evidence was sufficient to support the jury's verdict that defendant stalked Reverend Johnson within the meaning of section 646.9.

B. *No-Contact Probation Condition*

The trial court suspended imposition of sentence and placed defendant on felony probation on certain terms and conditions for 36 months. The conditions of probation included the following: "You are to stay at least 100 yards away from the Inner Light Ministries located at 5630 Soquel Drive in Soquel, California. You are not to have contact directly or indirectly in any fashion with Reverend Deborah Johnson, Beth Love and all staff members at the Inner Light Ministries."[3]

Defendant now asserts that the no-contact probation condition is unconstitutionally vague as to staff members and that the condition must be modified to include an express knowledge requirement. Defendant is concerned that she "may not know the identity of all of the Ministry staff and thus could contact a member of the Ministry outside of the Ministry campus without her knowledge."

The People argue that defendant "cannot be punished for an unwitting probation violation" and that "an explicit scienter requirement is unnecessary" and "would be

[3] The unsigned minute order, dated March 30, 2015, provided: "Stay away from Inner Light Ministries at 5630 Soquel Dr. and Rev. Deborah Johnson/Beth Long [*sic*] and all staff." The preprinted "Probation/Conditional Sentence Order," filed March 30, 2015, order indicated the same. The minute order and the preprinted order do not accurately reflect the condition orally imposed by the trial court as reflected in the reporter's transcript. The record of the oral pronouncement of the court prevails. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

superfluous."[4] The People agree that, if this court determines that the probation condition is unconstitutionally vague, we have the authority to add a knowledge requirement.

We are concerned here only with whether the challenged condition provides constitutionally adequate notice on its face. In *Sheena K.*, the California Supreme Court explained: "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' (*People v. Castenada* (2000) 23 Cal.4th 743, 751.) The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' (*ibid.*), protections that are 'embodied in the due process clauses of the federal and California Constitutions. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 7).' (*Ibid.*) The vagueness doctrine bars enforcement of ' "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." [Citations.]' (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115 (*Acuna*).) A vague law 'not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to

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[4] The Supreme Court granted review in *In re A.S.* (2014) 227 Cal.App.4th 400, review granted September 24, 2014, S220280. It limited review to the following issue: "Must no-contact probation conditions be modified to explicitly include a knowledge requirement?" (<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2083831&doc_no=S220280> [as of Nov. 14, 2016].) A constitutional vagueness issue is also pending before the Supreme Court in *People v. Hall* (2015) 236 Cal.App.4th 1124, review granted Sept. 9, 2015, S227193, which presents the following issues: "(1) Are probation conditions prohibiting defendant from: (a) 'owning, possessing or having in his custody or control any handgun, rifle, shotgun or any firearm whatsoever or any weapon that can be concealed on his person'; and (b) 'using or possessing or having in his custody or control any illegal drugs, narcotics, narcotics paraphernalia without a prescription,' unconstitutionally vague? (2) Is an explicit knowledge requirement constitutionally mandated?" (<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2112268&doc_no=S227193> [as of Nov. 14, 2016].)

policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Citation.]' (*Id.* at p. 1116.) In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that 'abstract legal commands must be applied in a specific *context*,' and that, although not admitting of 'mathematical certainty,' the language used must have ' "*reasonable* specificity." ' (*Id.* at pp. 1116-1117, original italics.) [¶] A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.)" (*Sheena K., supra*, 40 Cal.4th at p. 890.)

In *Sheena K.*, one of the probation conditions required Sheena K. to " 'not associate with anyone disapproved of by probation.' " (*Sheena K., supra*, 40 Cal.4th at p. 878.) To cure any unconstitutional vagueness or overbreadth, the appellate court "added the requirement that defendant have *knowledge* that the probation officer disapproved of a particular associate, and upheld the condition as so modified." (*Ibid.*)

The California Supreme Court agreed in *Sheena K.* that "in the absence of an express requirement of knowledge, the probation condition imposed upon defendant is unconstitutionally vague." (*Sheena K., supra*, 40 Cal.4th at p. 891, fn. omitted.) It reasoned: "Both as orally pronounced by the juvenile court, and as set forth in the minute order, the probation condition did not notify defendant in advance with whom she might not associate through any reference to persons whom defendant knew to be disapproved of by her probation officer." (*Id.* at pp. 891-892.) The court also agreed that "modification to impose an explicit knowledge requirement is necessary to render the condition constitutional. (See, e.g., *Justin S.* [(2001)] 93 Cal.App.4th [811,] 816 [probation condition modified to forbid the minor's association ' "with any person known to you to be a gang member" ']; *People v. Lopez* [(1998)] 66 Cal.App.4th [615,] 629,

fn. 5 [condition of probation modified to prohibit defendant from associating ' "with any person known to defendant to be a gang member" ']; *People v. Garcia* (1993) 19 Cal.App.4th 97, 103 [condition of probation modified to provide that the defendant 'is not to associate with persons he knows to be users or sellers of narcotics, felons, or ex-felons'].)" (*Id*. at p. 892.)

Sheena K. suggested that, "[i]n the interest of forestalling future claims identical to defendant's based upon the same language, we suggest that form probation orders be modified so that such a restriction explicitly directs the probationer not to associate with anyone 'known to be disapproved of' by a probation officer or other person having authority over the minor." (*Sheena K.*, *supra*, 40 Cal.4th at p. 892.) We are bound by this decision. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . The decisions of [the California Supreme Court] are binding upon and must be followed by all the state courts of California"].)

In this case, similar to *Sheena K.*, the challenged probation condition specifies only a general category of persons ("staff members"), but it does not provide defendant with advance notice of the identity of those specific persons. The staff members may change and may be individuals whom defendant does not know. Under the reasoning and authority of *Sheena K.* we conclude that, without a knowledge requirement, defendant does not have fair warning of the persons with whom she may not have contact.

In *People v. Patel* (2011) 196 Cal.App.4th 956, which the People cite, a condition of probation prohibited the defendant "from drinking alcohol, possessing it, or being in any place where it is the chief item of sale." (*Id*. at p. 959.) The Third District Court of Appeal modified the condition by inserting a knowledge requirement. (*Id*. at pp. 959, 961.) Because of the "dismaying regularity" with which the court was required to "revisit the issue in orders of probation," the Third District declared that, henceforth, it

would "no longer entertain this issue on appeal, whether at the request of counsel or on our own initiative," and would "construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken knowingly." (*Id*. at p. 960.) This court, like other courts of appeal, has previously rejected *Patel*'s blanket approach. (See *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1351 ["Until our Supreme Court rules differently, we will follow its lead on this point. (*Auto Equity Sales, Inc., supra*, 57 Cal.2d at p. 455.)"]; see also *In re Kevin F*. (2015) 239 Cal.App.4th 351, 362, fn. 5; *People v. Moses* (2011) 199 Cal.App.4th 374, 380-381.)

We conclude that an explicit knowledge requirement must be added to the no-contact probation condition to avoid unconstitutional vagueness.

DISPOSITION

The challenged probation condition is modified as follows: "You are not to have contact directly or indirectly in any fashion with Reverend Deborah Johnson, Beth Love and all persons whom you know to be staff members at the Inner Light Ministries." As modified, the order granting probation is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.

People v. Rosario
H042286